IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 53 OF 1988

Shahu Basappa Chikode, age 60, years, Occ: Agriculturist, of Kasaba Sangaon, Taluka-Kagal District : Kolhapur.) **.. Appellant/ (Orig. Deft.no.1)**

Versus.

1. Smt. Kashibai w/o. Anna Chikode Age: 42, Occ: Household work, R/o. Sulgod, Tal: kagal District: Kolhapur)

2. Balu Bhau Chikode, Age: 40 Occ: Agriculturist of Kasba Sangaon, Tal: Kagal, District: Kolhapur)

3(A) Balasaheb Bhau Chikode (Son) R/o. Kasba, Sangaon, Tal: Kagal, Dist: Kolhapur)

3(B) Smt. Akkatai Shankar Majale, R/o. House no.266, Ward no.1 Lohar Galli, Takawade Vesh Ichalkaranchi, Tal. Hatkangale) Dist: Kolhapur)

4. Ashok Balu Chikode, Age: 20 Occ: education, r/o. Chandur Tal: Hatkanagale, Dist: Kolhapur)

5. Sow. Jakubai w/o. Balu Chikode) Age: 35, Occ: Household work R/o. Chandur, Tal: Hatakanagale) Dist: Kolhapur) **.. Respondents. (Original Plaintiff**

and the Respdt no. 2 to 5-Original Def. no. 2 to 5)

Shri N.V. Bandiwadekar for the Appellant.
Shri N.J. Patil for the Respondent no.1.
Shri Dharmadhikari for the Respondent no.4 and 5.

CORAM: ABHAY S. OKA, J.

DATE : 2ND SEPTEMBER,2004.

JUDGMENT :-

1. On 9th February, 1988, this Second Appeal was admitted by passing the following order :

> "Whether the Appellant was a tenant in his individual capacity or as a member of H.U.F. is a substantial question of law."

2. I heard the Counsel appearing for the parties on the substantial questions of law incorporated in the aforesaid order.

3. The Appeal is filed by the Original Defendant No.1. The Respondent no.1 is the Original Plaintiff. The Respondent Nos.2 to 5 are rest of the Defendants. The Respondent no.1 filed a suit for partition and separate possession of various properties described in the plaint. The suit was

resisted by the Appellant as well as by other Defendants by filing their written statement. One of the contentions raised by the Appellant and Respondent Nos.2 and 3 in the written statement was that the suit properties were not the joint family properties. It was contended that the suit was barred under Order II Rule 2 of the Code of of Civil Procedure, 1908. A contention was raised that the suit was barred by the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948,. One of the controversies raised before the Trial Court was as regards land bearing survey no. 133. The Appellant/Defendant no.1 was claiming exclusive tenancy in respect of the said land and was claiming protection under the provisions of the said Act of 1948. The contention raised by the Respondent no.1 Plantiff was that the Appellant was holding the land bearing survey no.133 on behalf of the Joint Hindu Family.

4. The learned Trial Judge held that the Appellant Defendant no.1 cannot be said to be a deemed purchaser of the said land bearing survey no. 133 in his individual capacity as he was the eldest member in the family after the demise of Bassapa.

The Trial Court, therefore, recorded a finding that the property was a joint family property of the parties. The Trial Court proceeded to pass a decree for partition in respect of one eighth share of the Respondent no.1.

5. The Appeal being Civil Appeal no. 212 of 1981 was filed against the said decree by the present Appellant in the District Court. Another appeal being Civil Appeal no. 219 of 1981 claimed to be filed by Original Defendant nos. 4 and 5 in the District Court. Surprisingly, both the Appeals were not decided together. In Civil Appeal No. 219 of 1981, the learned Second Additional District Judge on 27th February, 1987 delivered separate judgement. It is surprising to note that in so far as Judgment delivered in Civil appeal no. 212 of 1981 is concerned there is no reference to the Judgment which was delivered on the same day in the companion Appeal. In so far as the companion appeal no. 219 of 1981 is concerned, the same was allowed and the decree passed by the Trial Court was modified. the Appellate court confirmed that he the Respondent no.1 was having one eight undivided share in all the suit properties described in paragraph

no.2 of the plaint. However, the Appellate Court held that the Appellant herein i.e. the Original Defendant no.1 was also having one half undivided share in the suit properties. The share of Defendant Nos.2, 4 and 5 was held to be one fourth and the share of Defendant no.3 was held to be one-eigth. An Appeal being Second appeal No. 368 of 1987 was preferred by the Appellant herein,i.e., Defendant no.1 and the Defendant nos.2 and 3 in this court for challenging the decree passed in Civil Appeal no. 219 of 1981 and the said Appeal came to be dismissed by this Court on 23rd July, 1987. The present Second Appeal is preferred against the Decree passed in Civil Appeal No.212 of 1981 was admitted. The Appellate Court while dismissing the Civil Appeal No.212 of 1981 confirmed the finding of Trial Court that survey no. 133 was not self acquired property of Defendant no.1 .

6. Shri Bandiwadekar learned counsel appearing for the Appellant has placed on record certain affidavits to show that the parties have settled the dispute. However, the fact of settlement is disputed by the learned counsel for Respondents nos. 4 and 5. Shri N.J. Patil, the learned Counsel for

the Respondent no.1 has placed on record a copy of letter sent by him on 2nd August 2004 to the Respondent no.1 for the purpose of seeking instructions. He has stated that the letter which was send by Registered Post A.D. has returned unclaimed and therefore he is unable to make any statement. Therefore without going into the question of compromise I have taken up the Second Appeal for final disposal.

7. Shri Bandiwadekar submitted that the issue whether the Appellant was holding the tenancy in respect of survey 133 in his individual capacity or on behalf of the joint Hindu Family ought to have been decided by the Tribunal established under the said Act of 1948 in view of the provisions of Section 85 of the said Act of 1948. He submitted that the Courts below have purported to decide the said issue. He submitted that the issue whether the Appellant has purchased land bearing Survey No.133 under Section 32(G) of the said Act of 19448 in his personal capacity or on behalf of the Joint Hindu Family can be decided only by the Tribunal under the said Act of 1948. He further submitted that the Trial Court ought to have referred the said issue

for adjudication by the competent Tribunal. In that behalf he relied upon a decision of the learned Single Judge of this Court reported in 2003(4) Bom.C.R.365 (Rama Dhondu Date v/s. Krishnaji Bhikaji Kadam and Others).

8. The learned Counsel appearing for Respondent Nos.4 and 5 relied upon another judgement of another learned single Judge (Coram: Ghatne, J) dated 11th October, 1971 in Civil Revision Application No.250 of 1971. He submitted that in view of the law laid down by this Court in the said Judgement, it was not necessary for the Civil Court to make a reference and the issue could have been decided by the Civil Court. He submitted that there being concurrent findings of facts no interference was called for.

9. It is an admitted position that the decree passed by the Appellate Court in Civil Appeal No. 219 of 1981 has been confirmed by this Court in Second Appeal no. 368 of 1987. The said decree has thus attained finality. By the said decree it is held that the Respondent no.1 Plantiff has one-eight undivided share in all the suit properties including the property bearing survey no.133. Infact the

finding is that, the Plaintiff and Defendant Nos. 1 to 5 have undivided shares as specified in the decree in the said land bearing survey no.133. It is also pertinent to note that in Second Appeal No. 367 of 1987 a specific ground was incorporated in Memorandum of Appeal by the Appellant herein to the effect that the Courts below ought to have held that survey no. 133 was his self acquired property.

10. Even if the Appellant is to succeed in this Appeal, a finding will have to be recorded that none of the other parties have share in the land bearing survey no.133. If at all such a decree is passed in this Second Appeal, the same will be contrary to the Decree passed in Civil Appeal No.219 of 1981 which has attained finality. As the said decree has attained finality, the issue regarding nature of holding of land bearing survey no.133 has been finally concluded. In the circumstances, it is not necessary to decide on merits the contention raised by the learned counsel for the parties. There is no option but to dismiss the Second Appeal. The Second Appeal is dismissed with no orders as to costs.

. C.C. expedited.

SD/-

JUDGE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE JURISDICTION

SECOND APPEAL NO. 53 OF 1988

Date of Judgment: 2nd September, 2004

For Approval Of :

HON'BLE SHRI. JUSTICE ABHAY S. OKA :

1. Whether Reporters of local papers may be allowed to see the judgment?

2. Whether to be referred to the Reporters or not?

3. Whether the lordship wish to see the fair copy of the judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder?

5. Whether it is to be circulated to all the Civil Judges?

6. Whether the case involves an important question of law and whether the copy of the judgment should be sent to Nagpur,

Aurangabad and Goa Offices?

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